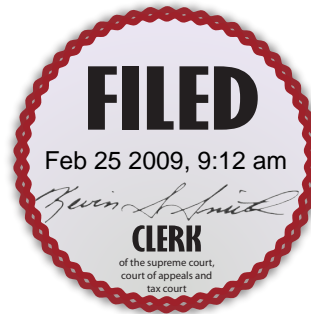


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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RAYMOND CASSIDY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 57A05-0810-CR-592
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE NOBLE CIRCUIT COURT  
The Honorable G. David Laur, Judge  
Cause No. 57C01-0805-FB-19

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February 25, 2009

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

Raising an Indiana Appellate Rule 7(B) challenge, Raymond Cassidy appeals the ten-year sentence he received for class B felony burglary.<sup>1</sup> Asserting that his sentence is inappropriate, Cassidy focuses on the fact that he pled guilty, the hardship that his lengthy incarceration will cause his family, and the lack of violence or significant property damage connected to his offense. We reverse.

## Facts and Procedural History

The defense established the following factual basis to support the guilty plea. On May 1, 2008, around 3:00 p.m., Cassidy, who was addicted to morphine, knowingly and intentionally entered the house of a person who had provided morphine to him in the past. G.Pl. Tr. at 6, 8, 9. In search of a morphine patch, Cassidy broke the lock on the door of an upstairs room. App. at 19. When one of the residents arrived home, Cassidy fled, empty-handed, out a window, without confrontation. *Id.* at 15-16, 19. Within approximately two or three hours, Cassidy learned that authorities were looking for him. He contacted the sheriff's office, came in for questioning around 6:00 p.m., and admitted his actions.

On May 5, 2008, the State charged Cassidy with class B felony burglary. A couple months later, he pled guilty as charged without a plea agreement. At a September 4, 2008 sentencing hearing, the court explained its decision as follows:

Well I can't imagine [] what it, what it would be like to, uh, come into my *house* and find somebody upstairs in my *house*. I just can't imagine that. And I can't imagine what it, what it would be like everyday after that for the rest of

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<sup>1</sup> See Ind. Code § 35-43-2-1(1)(B)(i)(breaking and entering a dwelling).

my life when I came *home* and, and wondered is somebody in my *house* today, am I safe, is my family safe. I just can't imagine what that's like, but people that are victims of *house burglaries* have to wonder that every time, every time. And you know I recognize thank goodness nobody was seriously hurt or hurt at all. But a *house burglary*, in this, in this day and age, or I suppose in any age presents just such serious, uh, potential for violence and danger and none occurred, and, and I guess I'm thankful for that, you ought to be thankful for that. I notice you got [sic] no prior felonies, uh, I, I'm concerned about your thinking process. I'm concerned about your addiction and as, as with, uh, the last defendant it appears to me that, uh, the, uh, presumptive [sic<sup>2</sup>], uh, is appropriate. So I'm going to sentence you to ten years. I'm going to recommend placement at a facility with substance abuse treatment. I am going to order, uh, you know the probation department talked about minimum time, I, for *house burglary I'm not going to sentence somebody to a minimum sentence, uh, that's too serious*. And for today I'm, I'm going to sentence you to eight years and order eight years served, the balance probation with "Criminal Thinking" and, and drug evaluation and a follow-up. Let's see how you do at the institution. A hundred and twenty days credit. I want you to, uh, deal with your addiction. I want you to dry out. I want you to, to give some thought about what it's like to break into somebody's *house* and, uh, and then we'll see where that goes.

Tr. at 22-24 (emphases added).

### Discussion and Decision

Indiana trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* So long as the sentence is within the

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<sup>2</sup> We assume the court meant "advisory."

statutory range, it is subject to review only for abuse of discretion. *Id.* A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* Under the advisory sentencing scheme, trial courts no longer have any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, therefore, the weight the trial court gives to such factors is not subject to appellate review. *Id.* at 491.

Preliminarily, we point out that the court's repeated references to burglary of a *house/home* are problematic. *See* Tr. at 22-24. A trial court abuses its sentencing discretion when it includes reasons that are improper as a matter of law. *Anglemeyer*, 868 N.E.2d at 490-91. A material element of a crime may not be used as an aggravating factor. *McElroy v. State*, 865 N.E.2d 584, 588 (Ind. 2007). As per our legislature, burglary is elevated from a class C to a class B felony when the State can show the additional element that the crime was committed in a "dwelling." *See* Ind. Code § 35-42-2-1. Thus, the fact that Cassidy committed burglary *in a house/home* was already accounted for by virtue of his having pled guilty to the class B felony. While the court did not order a greater-than-advisory sentence, it was clearly fixated on the "house/home" element when considering what sentence to impose. With this in mind, we address the 7(B) issue.

Indiana Appellate Rule 7(B) allows a court on review to revise a sentence if the sentence is inappropriate in light of the nature of the offense and the character of the offender. Although Rule 7(B) does not require this Court to be extremely deferential to a

trial court's sentencing decision, this court still gives due consideration to that decision. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). This court also recognizes the unique perspective a trial court brings to its sentencing decisions. *Id.* The defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate. *Krempetz v. State*, 872 N.E.2d 605, 616 (Ind. 2007).

Regarding the nature of the offense, the advisory sentence is the starting point our legislature has selected as an appropriate sentence for the crime committed. *Anglemyer*, 868 N.E.2d at 494. As a class B felony, burglary of a dwelling carries an advisory sentence of ten years, with a fixed term of between six and twenty years. Ind. Code § 35-50-2-5. The court sentenced Cassidy to ten years in prison but suspended two years. Cassidy's offense consisted of entering the dwelling of his morphine source during daylight hours when no one was home. Once in, Cassidy broke the lock on an interior door to gain access to a room in which he hoped to find a morphine patch to steal. Before finding any morphine, Cassidy was surprised by the arrival of a resident of the house. Cassidy responded by fleeing without violence, empty-handed. There is no indication that the victim of the burglary ever requested restitution or offered any opinion regarding sentencing. No injuries were reported.

Moving next to the question of character, we often look at criminal history. Our supreme court has emphasized that "the extent, if any, that a sentence should be enhanced [based upon prior convictions] turns on the weight of an individual's criminal history." *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). "This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense,

and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006). The court's only comment regarding Cassidy's history was that it contains no prior felonies. Indeed, Cassidy's adult record is minimal, consisting of three driving misdemeanors that resulted in payment of fines. In 1996, Cassidy admitted to three counts as a juvenile; these resulted in unsupervised home detention twelve years before the current offense. Cassidy was not on probation at the time of the burglary.

To some degree, Cassidy's decision to plead guilty reflects well on his character. *See Francis v. State*, 817 N.E.2d 235, 237-38 (Ind. 2004) ("A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and extends a benefit to the State and to the victim or the victim's family by avoiding a full-blown trial."). Unlike a defendant who agrees to a guilty plea in exchange for some particular benefit from the State, Cassidy pled guilty as charged with no agreement. Accordingly, State resources were saved without a corresponding advantage to Cassidy. *See Scheckel v. State*, 655 N.E.2d 506, 511 (Ind. 1995) (noting that a defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return). On a related note, we believe that the fact that Cassidy turned himself in and confessed within a few hours of the offense also reflect positively on his character.

We find less compelling Cassidy's assertion that family hardship should play into the equation. Imprisonment is often a hardship on dependents. However, the standard is *undue* hardship, and Cassidy has provided no evidence as to how a ten-year incarceration, as

opposed to a shorter term, would impose additional hardship on his family. *See* Ind. Code § 35-38-1-7.1(b)(10); *Abel v. State*, 773 N.E.2d 276, 280 (Ind. 2002); *Vazquez v. State*, 839 N.E.2d 1229, 1234 (Ind. Ct. App. 2005), *trans. denied*. That said, Cassidy’s work history<sup>3</sup> and support of his family are commendable and reflect positively on his character.

In sum, considering the very mild nature of Cassidy’s particular crime, as well as his character (illustrated by his lack of significant criminal history, his guilty plea without benefit of an agreement, his prompt submission and confession to authorities, and his previous support of his family despite limited resources), we conclude that a sentence less than the advisory is warranted in this case. A revised sentence of six years executed is appropriate, particularly when one subtracts the “dwelling,” or house/home, element from the sentencing calculation. Although we conclude that the term of the sentence ordered below is inappropriate, we make no change to the recommendation of substance abuse treatment or the payment of costs and fees.

Reversed.

ROBB, J., and BROWN, J., concur.

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<sup>3</sup> Despite difficulty with reading and writing, and possessing only a ninth grade education, Cassidy apparently began working when he was a teenager to take care of his wife and son. App. at 18, 19, 52, 64. During the ten years thereafter, he did welding, roofing, and hunting to support them as well as a second young son. *Id.* at 31, 64. At the time of the offense, Cassidy was receiving unemployment after having been laid off. Tr. at 19.